

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

TORONTO ARTSCAPE INC.

Respondent

FACTUM OF THE APPLICANT

(Application Returnable January 5, 2024)

December 21, 2023

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Court File No. CV-23-00711609-00CL

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PART I – THE MOTION

The Applicant, The Toronto-Dominion Bank (the “**Bank**”) seeks the following Order, substantially in the form attached as Schedule “A” (the “**Appointment Order**”) to the Notice of Application:

- a) Appointing msi Spergel inc. as Receiver (“**Spergel**” or the “**Receiver**”), without security, of the assets, undertakings and properties of the Respondent, Toronto Artscape Inc. (the “**Debtor**”) acquired for, or used in relation to the Debtor’s affairs, ownership of and operations at the real property legally described at Schedule “A” to the Appointment Order sought (the “**Real Property**”), and the Youngplace Shared Appreciation Mortgages, defined at Schedule “A” to the Appointment Order, and including all proceeds thereof, and excluding the Excluded Property as defined in the Appointment Order sought;
- b) That the time for service, filing and confirming of the Notice of Application and the Application Record be abridged and validated so that this application is properly returnable today and dispensing with further service thereof; and,

c) Such further and other relief as to this Honourable Court may seem just.

The Position of the Bank

1. It is the Bank's position that the present circumstances are an appropriate case for the appointment of the Receiver, including the following (all capitalized terms as defined herein):

- a) The Bank is a secured creditor of the Debtor pursuant to the GSA and the Mortgage. As of December 11, 2023, the Debtor is indebted to the Bank in the amount of \$21,016,796.09;
- b) The Debtor defaulted under the terms of the Financing, as a result of unresolved borrowing excesses, failing to make payments as they became due, the failure to repay \$4,000,000.00 due on the Operating Loan by June 30, 2023, and a material adverse change in the Debtor's operations due to its inability to fund the continuation of operations in the normal course;
- c) As a result, the Bank issued the Demand¹, which has expired;
- d) The Bank has provided a significant period of time through the Forbearance Agreement and the Addendum, to permit the Debtor to organize its affairs. In the face of the expired Demand, the Debtor is insolvent. No further terms of credit nor forbearance is available to the Debtor from the Bank. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
- e) The Bank's Security provides the Bank with the right to appoint a Receiver over all property of the Debtor, as a result of the Defaults;

¹ Dated August 8, 2023, including a Notice of Intention to Enforce Security to the Debtor dated August 8, 2023, pursuant to section 244(1) of the *BIA*.

- f) The stakeholders have worked together to settle the terms of the Appointment Order;
and,
- g) A Receiver will also be required to preserve the property of the Debtor and complete the orderly sale of same, and to ensure that the proceeds of any such sale are applied to the Debtor's obligations. In relation to any such sale, the Appointment of Receiver is also necessary to deal with the subsequent claims to the proceeds.

PART II – FACTS/OVERVIEW

- 2. The Debtor is a Not-for-Profit corporation incorporated pursuant to the laws of the Province of Ontario, with its registered office located in the City of Toronto, Ontario.

Reference: Affidavit of Kathryn Furfaro, sworn December 21, 2023, at para 2 and Exhibit “A” thereto (the “Furfaro Affidavit”).

- 3. The Debtor's operations consisted of, among other things:
 - a) providing various property management services to residential units for artist and artist led families and commercial tenants, through arrangements with the City of Toronto (the “City”);
 - b) providing mortgage program management for approximately 85 affordable home ownership units; and,
 - c) providing venue rental from owned or leased premises.

Reference: Furfaro Affidavit at para 3.

- 4. The Debtor has ceased operations in the normal course.

Reference: Furfaro Affidavit at para 4.

5. The Bank seeks the Appointment Order appointing Spergel as Receiver (the “**Appointment Order**”) over specific assets as follows (all as detailed below):

- a) The Launchpad Real Property;
- b) Youngplace and Triangle Lofts; and,
- c) Youngplace Shared Appreciation Mortgages.

Reference: Furfaro Affidavit at para 5.

6. The Appointment Order excludes certain Excluded Property (as defined therein and detailed below), which the Receiver will not be appointed over.

Reference: Furfaro Affidavit at para 6.

The Debtor’s Assets

Property included under the Appointment Order

Launchpad Real Property (the Bank as Senior Creditor)

7. The Debtor’s operations included a co-working and venue space, known as “Artscape Daniels Launchpad”, from owned real property, municipally known as 130 Queens Quay East, 4th Floor, Toronto, Ontario, legally described at Schedule “A” to the Appointment Order (the “**Launchpad Real Property**”).

Reference: Furfaro Affidavit at para 7.

8. The Bank holds the Mortgage (as defined below) over the Launchpad Real Property.

Reference: Furfaro Affidavit at para 8, and Exhibit “B” thereto.

Youngplace and Triangle Lofts (First Ontario as Senior Creditor)

9. As further detailed below, in addition to the Launchpad Real Property, the Debtor also owns the following real properties that will be subject to the Appointment Order if same is granted:

a) Artscape Youngplace located at 180 Shaw Street, Toronto, Ontario ("**Youngplace**").

Youngplace was a community cultural hub located in Toronto's Queen West neighborhood and includes owned commercial units;

b) Artscape Triangle Lofts located at 38 Abell Street, Toronto, Ontario ("**Triangle Lofts**").

Triangle Lofts is comprised of affordable units in downtown Toronto and is designated for artists and their families. The Triangle Lofts are a result from efforts of the City's Affordable Housing Office and its Home Ownership Assistance Program, "Section 37" development agreements and City Planning, plus the Debtor's development partners. Triangle Lofts includes owned residential units.

Reference: Furfaro Affidavit at para 9.

10. Youngplace is subject to first Charges over thirteen units and two parking spaces in favor of First Ontario Credit Union Limited ("**First Ontario**"), and second charges over certain units in favor of Community Forward Fund ("**CFF**").

Reference: Furfaro Affidavit at para 10.

11. Triangle Lofts is subject to first Charges over twenty units in favor of First Ontario, and second charges over certain units in favor of CFF.

Reference: Furfaro Affidavit at para 11.

Youngplace Shared Appreciation Mortgages

12. The Debtor is also the holder of five mortgages, each registered against a corresponding unit at Youngplace (the “**Youngplace Units**”) and are intended to assist artists to own property for their own use (the “**Youngplace Shared Appreciation Mortgages**”). The Debtor formerly owned the Youngplace Units and is the mortgagee on each of the Youngplace Shared Appreciation Mortgages.

Reference: Furfaro Affidavit at paras 12 and 13.

13. The Debtor was provided an Option to Purchase in relation to each of the Youngplace Units and the Youngplace Share Appreciation Mortgages.

Reference: Furfaro Affidavit at para 14.

14. Pursuant to the Youngplace Share Appreciation Mortgages, no payments are required by each mortgagor to the Debtor until the subject Youngplace Share Appreciation Mortgage is discharged. When a mortgagor sells a Youngplace Unit, the Debtor is entitled to a payment. Under the terms of each of the Youngplace Share Appreciation Mortgages, the payment equals the lesser of the interest at the rate of 15% per annum or a percentage of the increase in the selling price from the Debtor’s original selling price (as calculated in the Youngplace Shared Appreciation Mortgages), plus the principal amount of the respective charge.

Reference: Furfaro Affidavit at paras 15 and 16

The Excluded Property (Property not included under the Appointment Order)

15. In consultation with the Debtor, other secured creditors and the City, the Appointment Order sought herein does not include the Excluded Property. The Debtor has segregated the Excluded Property, as detailed at Schedule “B” to the Order sought herein, into two categories:

- a) the not-for-profit residential affordable housing and related assets (“**NFP Residential Assets**”);

- b) the not-for-profit event hubs contracts and residual assets of the Debtor used in its operations ("**NFP Hubs Assets**").

Reference: Furfaro Affidavit at para 17.

NFP Residential Assets

16. The NFP Residential Assets includes, without limitation:

- a) The Debtor's leasehold interest in certain real properties operated by the Debtor as affordable rental housing pursuant to various agreements to which the City is a party, some of which are subject to charges in favour of Vancity Community Investment Bank ("**Vancity**"); and,
- b) Shared appreciation mortgages and options to purchase in favour of the Debtor and registered on title to certain residential units which are part of the Debtor's affordable home ownership program, operated pursuant to various agreements with the City.

Reference: Furfaro Affidavit at para 18.

NFP Hubs Assets

17. The NFP Hubs Assets includes:

- a) Certain shared appreciation mortgages;
- b) Certain agreements with the City in relation to owned or leased properties as follows:
 - i. Incentives Contribution Agreement;
 - ii. Second Mortgage & Option to Purchase Agreements;
 - iii. Contribution Agreement;
 - iv. Home Ownership Assistance Program Delivery Agreement; and,
 - v. Triparty Affordable Housing Delivery Agreement.

Reference: Furfaro Affidavit at para 19.

18. The Debtor is working with the City on a plan to transfer the Excluded Property to third parties, with the intent that certain services will continue to be provided to the community by these third parties. The Debtor has advised that it is working on the details on the transfers of each of the NFP Residential Assets and the NFP Hubs Assets and is intending on seeking the approval of the transfer of these assets and a vesting order in relation to same from this Court.

Reference: Furfaro Affidavit at para 20.

Other Secured Creditors

19. As detailed above:

- a) Vancity is a secured creditor of the Debtor, and it is anticipated that Vancity will not oppose this application and have been served with same.
- b) First Ontario is a secured creditor of the Debtor, and it is anticipated that First Ontario will not oppose this application and have been served with same.
- c) Community Forward Fund is a creditor of the Debtor and have issued a demand for payment to the Debtor dated August 25, 2023.

Reference: Furfaro Affidavit at para 21.

Defaults

20. The Debtor defaulted under the terms of the Financing (as defined below) as a result of:

- a) unresolved borrowing excesses and failing to make payments as they became due and the failure to repay \$4,000,000 due on the Operating Loan by June 30, 2023, and,
- b) a material adverse change in the Borrower's operations due to its inability to fund the continuation of operations in the normal course.

(collectively, the "Defaults").

Reference: Furfaro Affidavit at para 22.

21. Following the Defaults, and as further detailed below, the Bank did issue the Demand, following the expiry of which the Debtor and the Bank entered into the Forbearance Agreement (as defined below). The Forbearance Agreement contained a consent to the Order sought herein. The Forbearance Agreement was to terminate on September 29, 2023, and was extended by way of an Addendum (as defined below) which terminated on October 31, 2023. Forbearance has continued day-to-day since October 31, 2023.

Reference: Furfaro Affidavit at para 23.

The Financing and The Bank's Security

22. As of December 11, 2023 the Debtor is indebted to the Bank in the amount of \$21,016,796.09, plus the costs of enforcement, including legal and professional costs, and continuing interest (the "**Obligations**"), in respect of certain financing advanced to the Debtor pursuant to the terms of a Letter Agreement dated February 11, 2022, and amended by the Amending Agreements dated October 12, 2022, November 29, 2022, and February 24, 2023 (collectively, the "**Letter Agreement**").

Reference: Furfaro Affidavit at para 24, and Exhibit "C" thereto.

23. The credit facilities established by the Letter Agreement are:

- a) Operating Loan: with a maximum credit limit of \$1,000,000.00, which increased to \$5,000,000.00 between November 29, 2022 and June 30, 2023, upon which the sum of \$4,553,750.81 was owing as at December 11, 2023 (the "**Operating Loan**");
- b) Term Loan: upon which the sum of \$14,032,056.93 was owing as at December 11, 2023;
- c) Term Loan: upon which the sum of \$2,428,534.22 was owing as at December 11, 2023 (the "**Wychwood Term Loan**"); and,

d) Credit Card: for an aggregate amount of \$150,000.00, upon which the sum of \$2,454.13 was owing as at December 11, 2023.

(collectively, the “**Financing**”).

Reference: Furfaro Affidavit at para 25.

24. At the requests of the Debtor, the credit limit on the Operating Loan was temporarily increased from time to time through February 2022 to June 2023 from \$1,000,000 to \$5,000,000.

Reference: Furfaro Affidavit at para 26.

25. The Operating Loan is payable on demand. The credit limit of the Operating Loan was to return to \$1,000,000.00 on June 30, 2023, with borrowings on the Operating Loan following June 30, 2023, to be less than \$1,000,000.00.

Reference: Furfaro Affidavit, at paras 27 and 29.

Bank Security

26. The Wychwood Term Loan was advanced at the request of the Debtor in February 2022 to refinance a mortgage loan over the property known as 76 Wychwood Toronto.

Reference: Furfaro Affidavit, at para 30.

27. The Financing is secured by, inter alia, the following:

- a) General Security Agreement from the Debtor dated June 10, 2003 (the “**GSA**”);
- b) First position Charge/Mortgage, in the original principal sum of \$16,900,000, receipted as instrument number AT5900813 on November 2, 2021, and amended by instrument numbers AT6017280 and AT6246203 on March 15, 2022 and December 13, 2022 respectively to increase the principal amount

secured thereunder to \$21,500,000 (the “**Mortgage**”), as governed by Standard Charge Terms No. 8520 (the “**Standard Charge Terms**”); and

c) A General Assignment of Rents with respect to the Launchpad Real Property (collectively, the “**Security**”).

Reference: Furfaro Affidavit, at para 31 and Exhibits “D” to “F” thereto.

The Bank’s Security Interest in The Personal Property of the Debtor

28. The GSA secures all personal property of the Debtor. The Bank has registered Financing Statement as against the Debtor pursuant to the provisions of the Personal Property Security Act (Ontario) to perfect its security interest in the personal property of the Debtor secured under the GSA.

Reference: Furfaro Affidavit, at paras 32-34, and Exhibit “H” thereto.

The Bank’s Security Interest in the Launchpad Real Property

29. The Bank’s interest in the Launchpad Real Property is secured by the Mortgage, which constitutes a first charge on the Launchpad Real Property, as governed by the Standard Charge Terms.

Reference: Furfaro Affidavit at paras 35-37.

Defaults, the \$1.5MM Bulge Loan and the Demand

30. In May 2023, the Debtor’s file was transferred to the Bank’s Financial Restructuring Group due to liquidity concerns, and on May 24, 2023, the Bank’s Financial Restructuring Group and the Debtor had an introductory telephone call. The Debtor advised that it was restructuring with the assistance of KPMG LLP, would be marketing the Launchpad Real Property for sale, with a goal of selling the Launchpad Real Property by October 31, 2023; It

was unable to pay the Bank the \$4,000,000.00 due on the Operating Loan by June 30, 2023; and It required, in addition to the \$5,000,000.00 Operating Loan, further funds to continue operations through the period of time to sell the Launchpad Real Property.

Reference: Furfaro Affidavit at paras 38 and 39.

31. Following initial communications between the Bank and the Debtor, the Bank engaged Spergel as the Bank's financial advisor for the purpose of reviewing and assessing the assets, financial position, business and operations of the Debtor, which was agreed to by the Debtor, pursuant to the engagement letter signed on June 2, 2023 (the "**Engagement Letter**").

Reference: Furfaro Affidavit at para 41 and Exhibit "H" thereto.

32. The Debtor entered into an exclusive sales listing agreement with CBRE Limited Brokerage in May 2023, and the Launchpad Real Property was listed for sale on June 16, 2023, with a listing price of \$22,500,000. The Bank is not aware of any firm offers made to purchase the Launchpad Real Property.

Reference: Furfaro Affidavit at para 42.

33. In June of 2023, as a result of the Debtor's liquidity issues and its lack of cash to fund operations, the Debtor requested from the Bank \$1,500,000 in operating credit in addition to the \$5,000,000 sum advanced on the Operating Loan (with \$4,000,000 due on the Operating Loan by June 30, 2023) (the "**\$1.5MM Bulge Loan**"). Terms with respect to the \$1.5MM Bulge Loan were discussed as between the Debtor and the Bank. The Debtor did advise the Bank that it was in discussion with the City with respect to the City providing a guarantee to the Bank to support the \$1.5MM Bulge Loan.

Reference: Furfaro Affidavit at paras 45 and 46.

34. The Bank confirmed that it was agreeable to the \$1.5MM Bulge Loan being advanced to the Debtor to be payable by October 31, 2023. Required security for the \$1.5MM Bulge Loan was a guarantee to the Bank in the sum of \$1,500,000 from the City.

Reference: Furfaro Affidavit at para 48.

35. The City required modifications to the guarantee requested by the Bank to provide the \$1.5MM Bulge Loan, and on July 12, 2023, an email was sent to the Debtor advising that this would be an issue for the Bank. In this email to the Debtor, the Bank detailed the basis for the Bank's concerns with the City's position and confirming that the Bank's position would be worse off by \$1,500,000 in a wind-down scenario.

Reference: Furfaro Affidavit at para 51 and Exhibit "K" thereto.

36. On July 20, 2023, discussions did take place between counsel for the Bank, the Debtor and the City. The City confirmed that it required an agreement with the Bank and the Debtor that any guarantee provided by the City would be paid in full the earlier of October 31, 2023 or the sale of the Launchpad Real Property and would be secured with a first charge over sale proceeds from the Launchpad Real Property.

Reference: Furfaro Affidavit at para 54.

37. On August 1, 2023, the Debtor provided an updated cash flow to Bank. This updated cash flow showed a cash burn by the Debtor of \$500,000 to the end of August 2023.

Reference: Furfaro Affidavit at para 55.

38. On August 3, 2023, as a result of the Debtor's worsening cash position and there being no terms in place with respect to the \$1.5MM Bulge Loan, the Bank advised the Debtor that it would be issuing a demand for payment.

Reference: Furfaro Affidavit at para 56.

39. As a result of the Defaults, and the Bank's concerns with respect to the Debtor's cash burn, the Bank did deliver a demand for payment and a Notice of Intention to Enforce Security to the Debtor, both dated August 8, 2023, pursuant to section 244(1) of the Bankruptcy and Insolvency Act (the "**BIA**"), (the "**Demand**").

Reference: Furfaro Affidavit at para 57 and Exhibit "L" thereto.

40. Despite the Defaults and the Demand, the Bank continued to have meetings and correspondence with the City and the Debtor, in an attempt to reach an agreement on continued terms of credit and forbearance in the face of the Defaults.

Reference: Furfaro Affidavit at para 58.

41. Further, despite the Defaults and the Bank's substantial concerns relating the to the Debtor's cash flow and lack of liquidity, on August 18, 2023, the Bank proposed forbearance terms, which included, among other things the \$1.5MM Bulge Loan, to be secured by a new guarantee from the City in the sum of \$1,500,000.00.

Reference: Furfaro Affidavit, at para 59 and Exhibit "M" thereto.

42. Following the expiry of the Demand effective August 21, 2013, while reserving all rights, the Bank agreed to provide continuing banking services and credit on the Operating Loan with a Credit Limit of \$4,500,000, to assist the Debtor with its efforts to arrange for forbearance

terms.

Reference: Furfaro Affidavit at para 60.

43. On August 21, 2023, counsel for the City advised that the City would not provide the guarantee of \$1,500,000 as security for the \$1.5MM Bulge Loan unless the conditions required by the City, including a first security position over the Launchpad sale proceeds were met.

Reference: Furfaro Affidavit at para 61 and Exhibit “N” thereto.

44. The position taken by the City in requiring a first charge of \$1,500,000 on the sale proceeds of Launchpad Real Property in priority to the Bank, would result in the City having no risk of loss on any guarantee provided and put the Bank at risk of losing \$1,500,000 in sale proceeds. The City’s position worsened the Bank’s security position by \$1,500,000.

Reference: Furfaro Affidavit at para 62.

45. On August 28, 2023, the Bank agreed to allow access to the Debtor’s account at the Bank to process payroll on readily available funds. This payroll eventually cleared on August 30, 2023.

Reference: Furfaro Affidavit at para 63.

46. On August 31, 2023, the Debtor provided the Bank with a Continuity Plan for September 2023 (the “**Continuity Plan**”). The Continuity Plan was focussed on attempting to continue the not-for-profit services provided by the Debtor namely its property operating and tenant services , and particularly for its residential, but also community hub portfolio through September 2023 and following any appointment of a Receiver.

Reference: Furfaro Affidavit at para 64.

47. The Debtor informed the Bank that the City was agreeable to providing financial assistance to the Debtor through September 2023 to assist with the funding of limited continuing operations in relation to the Debtor's Continuity Plan.

Reference: Furfaro Affidavit at para 65.

48. On September 12, 2023, the Bank and the Debtor entered into a forbearance agreement (the "**Forbearance Agreement**"), the terms of which included:

- a) a termination date of September 29, 2023;
- b) continued deferral of the Debtor's monthly payments; and,
- c) a consent to a template Court Order appointing Spergel as Receiver of certain property of the Debtor, including the Launchpad Real Property (the "**Consent Order**").

Reference: Furfaro Affidavit at para 66 and Exhibit "O" thereto.

49. On October 10, 2023, the Bank and the Debtor entered into an Addendum to Forbearance Agreement (the "**Addendum**"), the terms of which included:

- a) a new termination date of October 31, 2023; and,
- b) the Debtor acknowledged that the Consent Order was valid and binding and continued to be enforceable.

Reference: Furfaro Affidavit at para 67 and Exhibit "P" thereto.

Youngplace, Triangle Lofts and the Shared Appreciation Mortgages

50. The Bank and the Debtor have worked together with Spergel, the City, and the secured creditors First Ontario, CFF and VanCity with respect to the Property to be included in the Appointment Order and the Excluded Property.

Reference: Furfaro Affidavit at para 68-70.

Excluded Property

51. During the period of forbearance, the Bank consulted with the Debtor and the City, in relation to the Excluded Property which would not be included in the Appointment Order.

Reference: Furfaro Affidavit at para 71.

52. Real property in which the Debtor leases and certain leases that have been charged in favour of Vancity, would also be Excluded Property.

Reference: Furfaro Affidavit at para 72.

53. Further, shared appreciation mortgages and options to purchase in favour of the Debtor and registered on title to certain residential units which are part of the Debtor's affordable home ownership program, operated pursuant to various agreements with the City, would also be in the Excluded Property.

Reference: Furfaro Affidavit at para 73.

54. The Debtor is working with the City on a plan to transfer the Excluded Property to third parties, with the intent that certain services will continue to be provided to the community by these third parties.

Reference: Furfaro Affidavit at para 74.

55. The Debtor has advised that it is working on finalizing the details on the transfers of each of the NFP Residential Assets and the NFP Hubs Assets, and is intending on seeking the approval of the transfer of these assets and a vesting order in relation to same from this Court.

Reference: Furfaro Affidavit at para 75.

The Appointment of a Receiver

56. The Obligations due pursuant to the Demand have not been paid. The ten (10) day period under section 244 of the BIA has expired. The Debtor in default of the Financing. The Bank is in a position to appoint a receiver over the assets and property of the Debtor as secured by the Bank's Security, pursuant to section 243 of the BIA.

Reference: Furfaro Affidavit at paras 76 and 77.

57. The Standard Charge Terms grant the Bank the power to appoint a Receiver over the Launchpad Real Property as a result of the Defaults.

Reference: Furfaro Affidavit at paras 78 to 80.

58. The GSA grants the Bank the right to appoint a Receiver over all personal property of the Debtor, as a result of the Defaults of the Debtor under the Financing.

Reference: Furfaro Affidavit, at paras 81 to 83.

59. Spergel has consented to act as Receiver, should this Honourable Court so appoint it.

Reference: Furfaro Affidavit, at para 96.

PART III – ISSUES, LAW AND ARGUMENT

Issues

60. The issues before this Court, and addressed below, are:

- a) Does this Court have jurisdiction to appoint the Receiver?
- b) Should this Court appoint the Receiver?
- c) If this Court decides to appoint the Receiver, then are the terms of the Receivership Order appropriate in the circumstances of this receivership?

(a) This Court has jurisdiction to appoint the Receiver

61. Subsection 243(5) of the BIA provides that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the “locality of the debtor”, which is defined in section 2 of the BIA.

[BIA, s. 2, Schedule “B”](#); [BIA, s. 243\(5\), Schedule “B”](#).

62. The Debtor is an Ontario corporation with its registered office located in Toronto, Ontario. The business carried on by the Debtor that is subject to the proposed receivership includes premises located in Toronto, Ontario. The locality of the Debtor is, therefore, Ontario, and this application is properly brought before the Ontario Superior Court of Justice, Commercial List.

63. Subsection 243(4) of the BIA provides that only a trustee, as defined in section 2 of the BIA, may be appointed under subsection 234(1) of the BIA.

[BIA, s. 2, Schedule “B”](#); [BIA, s. 243\(4\), Schedule “B”](#).

64. Spergel is a trustee as defined in the BIA, and therefore, satisfies the requirements for appointment pursuant to the BIA.

(b) This Court should appoint the Receiver

65. Section 244(1) requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security.

[BIA, s. 244\(1\), Schedule “B”](#).

66. The Applicant sent the Demand together with its Notice of Intention to Enforce Security pursuant to such section of the BIA, to the Debtor on August 8, 2023, and this application is being heard on a date that is after the date on which any applicable notice periods expired.

67. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the “CJA”) provides for the appointment of a receiver by this Court where it is “just and convenient”. Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.

[CJA, s. 101, Schedule “B”](#); [BIA, s. 243\(1\) and 243\(2\), Schedule “B”](#).

68. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd.*:

28 In determining whether it is “just or convenient” to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, the court must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto, which includes the rights of the secured creditor under its security. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. Rather, the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

...while the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an

agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, supra, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]).

[RMB Australia Holdings Limited v. Seafeld Resources Ltd., 2014 ONSC 5205 \(CanLII\), paras. 28-29.](#)

69. The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is key. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties.

[Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866 \(CanLII\) at para 27.](#)

70. This relief that is granted more as a matter of course, becomes even less extraordinary when dealing with a default under a mortgage. That is the case here.

[BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 1953 \(CanLII\) at paragraph 44.](#)

71. This even further lowered burden in cases in which there has been a default by a mortgagor is described by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.*:

20 I must also note that there appears to be a major distinction between those case where the borrower is in default and those where it is not (or a receiver is being asked for in say a shareholder dispute - e.g. *Goldtex Mines Ltd. v. Nevill* (1974), 7 O.R. (2d) 216 (Ont. C.A.)). See *Receiverships, Bennet* (1985), at p.91 referring to: "In many cases, a security holder whose instrument charges all or substantially all of the debtor's property will request a court - appointed receivership if the debtor is in default". (In this case the plaintiffs have a very strong case - not only are the loans in default, they have matured). See also *Kerr on Receiverships* (1983), 16th ed. at p.5:

There are two main classes of cases in which appointment is made: (1) to enable persons who possess rights over property to obtain the benefit of those rights and to preserve the property, pending realization, where ordinary legal remedies are defective and (2) to preserve property from some danger which threatens it.

Appointment to Enforce Rights

In the first class of cases are included those in which the court appoints a receiver at the instance of a mortgagee whose principal is immediately payable or whose interest is in arrear. ... In such cases the appointment is made as a matter of course as soon as the applicant's right is established and it is unnecessary to allege any danger to the property.

***Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)) [“*Confederation Life*”], para. 20, Tab 1 of the Applicant’s Book of Authorities.**

72. In the present case, the Debtor is in default under the loan agreement and related transaction documents and the Mortgage is immediately payable, meaning that this is the first class of cases referred in *Confederation Life*. In this sort of case, allegations of danger to the property are not necessary, though such allegations do exist in this case, as described in the Furfaro Affidavit.

***Confederation Life*, para. 20.**

73. Thus, with the Applicant’s contractual entitlement to appoint a receiver and the existence of a mortgage default, the appointment of a receiver is not extraordinary relief, and the burden has been lowered further. With this lower burden, the following additional “just or convenient” factors identified by Justice Farley in *Confederation Life* may be considered:

- a) The lenders’ security is at risk of deteriorating;
- b) There is need to stabilize and preserve the Debtor’s business;
- c) Loss of confidence in the Debtor’s management; and,
- d) Positions and interests of other creditors.

***Confederation Life*, paras. 19-24.**

74. It is not essential that the moving party/secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.

Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated (1995), 30 C.B.R. (3d) 49 at paragraph 28, Tab 2 of the Applicant's Book of Authorities.

75. When the above *Confederation Life* factors are applied to this case, the Applicant submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances:

- a) ***The Debtor contractually agreed to the appointment of a receiver.*** The loan agreements and the related transaction documents among the Applicant and the Debtor expressly entitle the Applicant to appoint a receiver under certain circumstances, including the present circumstances. The Applicant now exercises these entitlements, subject to this Court's authority.
- b) ***The loan agreement is in default.*** As set out above, events of default have occurred and are continuing under the loan agreement and the related transaction documents. The Applicant has demanded on the Obligations. The Applicant provided the Debtor with statutory notice of its intention to enforce security, and the applicable notice periods have elapsed.
- c) ***The lenders' security is at risk of deteriorating.*** The Bank is concerned that the Debtor does not have the working capital needed to maintain the Launchpad Real Property. If the property of the Debtor, including the Launchpad Real Property, deteriorates, the realizable value of the Security will diminish as a result.
- d) ***The Debtor's business needs to be stabilized and preserved.*** The Debtor's liquidity crisis will continue to worsen in the absence of action. A receiver will be able

to take the necessary steps to preserve the Security, including conducting an orderly sale process that will generate recoveries for creditors. If the Debtor's business experiences further disarray, or the Security is not preserved, there will be further negative consequences.

- e) ***Position and interests of other Creditors.*** As at the date of this Factum, no creditor has opposed the receivership application. The Receiver will be able to properly and equitably deal with the interests of any creditors other than the Applicant. A receivership provides parties with an effective forum in which to deal with any issues, including any competing claims, that may arise in respect of the Debtor and its property.

76. As at the date of this Factum, the Applicant is not aware of any restructuring efforts by the Debtor that stands any reasonable chance of success.

(c) The Terms of the Receivership Order are Appropriate

77. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List's model receivership order, and the modifications to same are indicated in the blacklined copy provided.

Blackline of the draft Order against the Model Receivership Order; Application Record, Tab 1, Schedule "A-2".

PART IV – ORDER REQUESTED

78. For the reasons set forth herein and in the Application Record, it is respectfully submitted that the appointment of a receiver is just and convenient and is necessary for the protection of the estate of the Debtor and the interests of the Bank and other stakeholders.

79. The Bank respectfully requests that this Honourable Court grant the Appointment Order substantially in the form attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December, 2023



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SCHEDULE “A”**LIST OF AUTHORITIES**

1. *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (CanLII);
2. *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 (CanLII);
3. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII);
4. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List));
5. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (f) is appointed under subsection (1); or
- (g) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

Courts of Justice Act, RSO 1990, c. C-43.

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

THE TORONTO-DOMINION BANK

v.

TORONTO ARTSCAPE INC.

Applicant

Respondent

Court File No. CV-23-00711609-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO, ONTARIO

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